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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1950

No. 133

NORTON COMPANY, a corporation,
Petitioner,

vs.

DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS,
Respondent.

REPLY OF PETITIONER TO BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

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In its brief in opposition to Norton Company's petition for writ of certiorari, respondent does not deny the opinion of the Supreme Court of Illinois is in conflict with the decisions of this court and with the decision of the Circuit Court of Appeals cited by petitioner. Neither is there a denial that the questions involved are substantial and will affect all companies doing both an intrastate business in Illinois and an interstate business.

Respondent seeks to justify the decision of the lower court by citing cases of this court involving use taxes, manufacturing taxes and other taxes.

Respondent does not deny that as to the sales which are the basis of petitioner's claim, Norton Company is engaged in interstate commerce. It urges, however, that such interstate commerce can be taxed merely because petitioner, as to *other sales*, not here involved, was doing an intrastate business. The respondent is not consistent in that position, because it allowed part ($4110.09) of Norton Company's claim based on sales on orders accepted in Massachusetts, for machines manufactured in Massachusetts and shipped from there to Illinois customers, in interstate commerce. It gave as its reason for the allowance of that part of the claim that those sales were in interstate commerce and therefore not taxable (R. 11). However, all of the orders involved were accepted in Massachusetts, the goods ordered were all manufactured in Massachusetts and shipped from there to Illinois customers in interstate commerce. Norton Company denies its interstate business is taxable under the retailers' occupation tax act merely because it also does an intrastate business in Illinois.

The cases cited by respondent do not sustain respondent's theory. The respondent, to sustain its contention that interstate commerce can be taxed, cites decisions of this court involving three other forms of tax, namely, use taxes, sales taxes levied on the purchaser, and a manufacturer's privilege tax. While the respondent cites these cases, it is quite frank to admit no one of them is controlling in this case, but insists that read compositely they sustain its position. In other words, respondent contends that while each link in its chain of citations is too weak to support its present contention, the chain itself is strong enough to do so. This is a novel twist to the maxim that a chain

is no stronger than its weakest link. Not one of the cases cited by respondent involved a tax imposed upon the seller as is the Illinois tax. The nature of the taxes in those cases (which were different from the Illinois tax) is the very reason that those taxes were imposed. That is why they were sustained as constitutional. In each of those cases, the taxable event took place entirely in the taxing state. As to the use tax, the use of the article occurred in the state imposing that tax. As to the sales tax, the buyer on whom the tax was laid, took possession in the state imposing the tax under a contract made in that state, and as to the manufacturer's privilege tax, the manufacture took place in the state imposing that tax. The taxable event having occurred in the state imposing the tax, such imposition was held to be constitutional. It was immaterial that the law imposing the tax likewise made the seller the agent of the state to collect the use tax or sales tax from the taxpayer or that the size of the manufacturer's tax was to be measured by the gross sales of such manufactured products.

The Illinois legislature has not seen fit to levy any of those forms of tax. It has been content to levy a retailers' privilege tax, i. e., a tax on the seller, which has never been held to extend to interstate commerce and which the act itself expressly recognizes is not imposed thereon (Sec. 441, ch. 120, Ill. Rev. Stat. 1949).

The respondent cites *Nelson* v. *Sears Roebuck & Co.*, 312 U. S. 359 and *Nelson* v. *Montgomery Ward & Co.*, 312 U. S. 373. These cases involve a use tax and this court there pointed out that the tax is upon the purchaser for the use in Iowa of the commodities purchased and is a tax on the privilege of use after commerce is at an end. Obviously, those cases are no authority for imposing a privilege tax

on a seller of goods in interstate commerce, under the authority of the Illinois retailers' occupation tax act. Norton Company, as to the sales involved herein, was not doing business in Illinois.

Also cited by respondent is *American Manufacturing Co.* v. *St. Louis*, 250 U. S. 459. The court had before it a manufacturer's tax in the nature of an excise upon the conduct of a manufacturing business located in the city of St. Louis. There the American Manufaucturing Company was actually engaged in manufacturing in St. Louis and the tax was on that business. That case is no authority on which to tax interstate commerce in this case. In the instant case, Norton Company as to the sales which were the basis of its claim for credit, was not doing business in Illinois. Furthermore, it did no manufacturing in Illinois.

Respondent cites *McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33. There the court had before it a sales tax which was akin to the use tax because the ultimate burden of the tax, both in form and substance, was laid on the buyer for consumption. The New York tax was conditioned upon taxable events which occurred in the State of New York. In that case the sales contracts were all entered into in New York with New York customers. The deliveries were made in New York. The court there pointed out that the New York tax had no different effect upon interstate commerce than a tax on the use in New York of property which had just moved in interstate commerce. That case has no bearing on the Illinois retailers' occupation tax.

The respondent cites *International Harvester Co.* v. *Department of Treasury*, 322 U. S. 340. There this court had before it an income tax on corporations doing business in Indiana. The court pointed out the delivery of goods in that state was the taxable event and that Indiana was asserting authority over the fruits of transactions consum-

mated within its borders. The court also pointed out it had before it a case involving sales of Indiana goods to Indiana purchasers and sales by Indiana sellers of Indiana goods to purchasers who came to Indiana to take delivery there. The agreements to sell and the deliveries took place in Indiana. The court held those events would sustain an income tax by Indiana. The taxable event in that case was the consummation of the transactions in Indiana. That event was distinct from the interstate movement of the goods and took place after the interstate journey ended. We thus see that the court there did not have before it an occupation tax, such as now before this court.

Respondent also cites *General Trading Co.* v. *Tax Commission*, 322 U. S. 335, and concludes that these last two cases support the theory that the state of Illinois could tax Norton Company upon receipt of orders in Massachusetts, the acceptance of them in Massachusetts, the manufacture of the goods in Massachusetts and the shipment of the goods from there to Illinois in interstate commerce, if it does any business at all even though that business involved only soliciting within the state of Illinois. These cases do not so hold.

If Illinois desires to impose a constitutional tax in connection with transactions such as those involved in this case, the general assembly may have the power to do so by means of a use tax, as was done in Iowa, which has both a sales tax and a use tax. The lower court has no right to invade the legislative field and by judicial decision in effect impose the equivalent of a use tax, simply because respondent is dissatisfied with controlling decisions of this court and prior decisions of the Illinois Supreme Court as well as with the express language of the general assembly itself in section 2 of the retailers' occupation tax act, which forbids the application of the latter tax to interstate trans-

actions. If the decision of the lower court is permitted to stand, there would seem to be no further bar to the power of the several states to tax interstate commerce.

It is earnestly contended that while Norton Company does an intrastate business in Illinois, yet its other business which the lower court admits is interstate commerce, cannot be taxed merely because of the intrastate business.

It is respectfully submitted that the writ of certiorari issue in this case in order that this court may state its position in view of the latest attempt by a state to encroach upon the federal power over interstate commerce.

Respectfully submitted,

ROLAND TOWLE,
Counsel for Petitioner.